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No. 81-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY OF PETITIONERS

This Reply addresses only the respondents' arguments that the FCC acted properly in repealing its distant signal and syndicated programming rules and in rejecting a retransmission consent requirement for certain distant signals. On these points, respondents urge this Court to deny the petition for two basic reasons. The National Cable Television Association, Inc., asserts, without citing a single authority, that because the FCC's power to regulate cable is implied under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, the rule that this Court will not infer withdrawal of an agency's jurisdiction, "absent a clearly expressed congressional intention," is inapplicable. *FAA* v. *Robertson*, 422 U.S. 255, 266 (1975). The Federal respondents, on the other hand, while urging that it is "clear that Congress intended to place no limitation on the

Commission's authority to modify or eliminate the rules . . . ," also urges that Congress, by the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (Supp. III 1979), eliminated the FCC's power to modify its rules by imposing on cable television systems a retransmission consent requirement for certain distant signals. Brief for the Federal Respondents in Opposition, p. 14. According to both sets of respondents, a retransmission consent requirement cannot be reconciled with the Copyright Act, and Congress therefore repealed by implication in the Copyright Act the FCC's previously existing authority to impose such a requirement.

These assertions are not only inconsistent with the statutory language and the legislative history of the Copyright Act, but also fly in face of heretofore unquestioned principles of statutory construction. First, Congress, when it enacted the Copyright Act, expressly and quite specifically, *retained* the authority granted under previously enacted federal statutes: "Nothing in this title annuls or limits any rights or remedies under any other federal statute." 17 U.S.C. § 301(d) (Supp. III 1979). When Congress did so, moreover, it unquestionably was aware that this Court, in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and other decisions, had construed the Communications Act to encompass FCC regulation of cable television. Second, what evidence of legislative history there is demonstrates that Congress, by its enactment of the Copyright Act, did not favor the wholesale repeal of the distant signal and syndicated programming rules that the FCC has now effected:

> "We . . . caution the Federal Communications Commission . . . not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as . . . increased use of imported distant signals. These matters are ones of

> communications policy and should be left to the appropriate committees in the Congress for resolution." H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976).

Admittedly, the FCC, despite the Copyright Act, has the authority to prohibit *any* secondary transmissions of distant signals by cable systems, thereby imposing, in effect, full copyright liability for such transmissions. Given that fact, it is nonsensical to ascribe to Congress any intention to strip the FCC of the power to impose a retransmission consent requirement for those very signals. Such a requirement, which would leave intact the compulsory licensing scheme and statutory copyright liability for certain signals imported by cable television systems, would, in no sense, irreconcilably conflict with the Copyright Act. What the Congress rejected in that Act was across-the-board copyright liability for cable television systems, many of which had for years retransmitted, without payment of a single penny, programming purchased in the marketplace by both local and distant broadcast stations. *See* H. Rep. No. 94-1476, 94th Cong., 2d Sess. 8 (1976). However, the decision to reject across-the-board, full copyright liability does not lead inexorably to the conclusion that Congress was opposed in each and every respect to cable's participation in the marketplace in which broadcast stations must compete.

Respondents also urge that the FCC's repeal of its rules and its refusal to impose a retransmission consent requirement should be upheld because the FCC is under no duty to insulate broadcast stations from cable competition. However, far from increasing meaningful competition between cable systems and broadcast stations, the FCC's repeal of its distant signal and syndicated programming rules and its rejection of any retransmission consent requirement further insulate cable systems from competition in the marketplace. Under the new rules, cable systems may retransmit, subject only to a noncompensatory compulsory licensing fee, programming bar-

gained and paid for by local broadcast stations in the marketplace.

Respondents fail to come to grips with the distinct nexus between the Commission's 1972 cable television rules and the congressional enactment of the Copyright Act of 1976. The legislative history of that Act clearly indicates that continuation of the syndicated program exclusivity and distant signal rules was contemplated by the Congress as being essential to the compulsory licensing scheme created by the Act.

The FCC's responsibility is to provide a climate in which *all* the people, and not merely cable subscribers, have access to quality television programming. *See, e.g., National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). It has not done so here. While the FCC's decisions will enhance programming diversity for cable subscribers, they inevitably will have an adverse impact on the vast majority of television viewers who must rely on local broadcast stations.

Respectfully submitted,

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